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Nos. 04-277 & 04-281

IN THE
Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, *et al.*,
Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR CABLE-INDUSTRY PETITIONERS

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QUESTION PRESENTED

Whether, under the framework set out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the FCC was entitled to decide that, for purposes of regulation under the Communications Act, cable operators offering so-called "cable modem service" (high-speed Internet access over cable television systems) provide only an "information service" and not a "telecommunications service."

LIST OF PARTIES TO THE PROCEEDINGS

In the consolidated proceedings below, petitioners National Cable & Telecommunications Association ("NCTA"), Charter Communications, Inc., Cox Communications, Inc., Time Warner Inc., and Time Warner Cable Inc. were intervenors in support of the Federal Communications Commission and the United States.

Also intervening in the proceedings below were the Association of Communications Enterprises, AT&T Corp., BellSouth Corporation, BellSouth Telecommunications, Inc., Competitive Telecommunications Association, Focal Communications Corp., the Information Technology Association of America, the Utility, Cable & Telecommunications Committee of the City Council of New Orleans, the City and County of San Francisco, SBC Communications, Inc., the State of Vermont, the Vermont Department of Public Service, the Vermont Public Service Board, and WorldCom, Inc.

In the court of appeals, the petitioners were Brand X Internet Services LLC, Buckingham Township, the People of the State of California ex rel. Bill Lockyer, the Center for Digital Democracy, Conestoga Township, Consumer Federation of America, Consumers Union, Earthlink, Inc., East Hempfield Township, Martic Township, the National Association of Counties, the National Association of Telecommunications Officers and Advisors, the National League of Cities, Providence Township, the Public Utilities Commission of the State of California, the Texas Coalition of Cities for Utilities Issues, Verizon Internet Solutions d/b/a Verizon.net, Verizon Telephone Companies, and the United States Conference of Mayors.

CORPORATE DISCLOSURE STATEMENT

No publicly held company owns an interest of 10% or more in NCTA, Charter Communications, Inc., Cox Communications, Inc., or Time Warner Inc.

Time Warner Inc. and Comcast Corporation, both publicly held companies, each own an interest of 10% or more in Time Warner Cable Inc.

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Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee, Memorandum Opinion and Order, 14 FCC Rcd 3160 (1999) 6

Availability of Advanced Telecommunications Capability in the United States, Fourth Report to Congress, 19 FCC Rcd 20540 (2004) 4, 5

Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd 11501 (1998) 18, 20, 22

Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order, 4 FCC Rcd 1 (1988) 27

Industry Analysis and Tech. Div., Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of June 30, 2004* (rel. Dec. 22, 2004) (available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd1204.pdf) 4

Independent Data Communications Mfrs. Ass'n, Inc., Memorandum Opinion and Order, 10 FCC Rcd 13717 (CCB 1995) 27

Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) . . . . . *passim*

Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Notice of Inquiry, 15 FCC Rcd 19287 (2000) 3, 4, 7

OTHER MATERIALS

Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. Rev. 1272 (2002) 32, 33, 34

Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833 (2001) 31, 33

Richard W. Murphy, *A "New" Counter-Marbury: Reconciling Skidmore Deference and Agency Interpretive Freedom*, 56 Admin. L. Rev. 1 (2004) . . . 32, 35

Richard J. Pierce, Jr., I *Administrative Law* (4th ed. 2002) 17, 34

Richard J. Pierce, Jr., *Reconciling* Chevron *and* Stare Decisis, 85 Geo. L.J. 2225 (1997) 33

Gregg D. Polsky, *Can Treasury Overrule the Supreme Court?*, 84 B.U. L. Rev. 185 (2004) 32

Random House Webster's Unabridged Dictionary (2001) 21

S. Rep. No. 104-23 (1995) 24

Russell L. Weaver, *The Emperor Has No Clothes:* Christensen, Mead *and Dual Deference Standards,* 54 Admin. L. Rev. 173 (2002) 32, 33

BRIEF FOR CABLE-INDUSTRY PETITIONERS

This case concerns the proper regulatory treatment of so-called cable modem service, which is high-speed Internet service provided by cable operators over cable television systems. The FCC determined that, for purposes of regulation under the Communications Act, cable modem service constitutes solely an "information service" and does not include a separately cognizable "telecommunications service" component. The question here is whether, under the familiar framework of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), that interpretation of the Communications Act must be upheld. The answer is clearly yes.

The Communications Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public." 47 U.S.C. § 153(46). It further defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(43). Separately, the Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." *Id.* § 153(20). The FCC has stated that, under the Communications Act, providers of "telecommunications services" are presumptively subject to common-carrier duties, whereas providers of "information services" are left unregulated.

The FCC correctly held — and all parties here agree — that cable modem service, which is merely a form of Internet service and thus includes extensive computer functionality, constitutes an "information service." The FCC further held that, although "information service" is

by definition provided "via telecommunications," the "telecommunications" is integral to the service and not a separate "offering . . . for a fee directly to the public." That is the best reading of the statute and certainly constitutes a permissible interpretation. It must therefore be upheld under the *Chevron* doctrine, and the judgment of the court of appeals must be reversed.

To reach that result, the Court need not resolve the *stare decisis* issue that kept the court of appeals from extending *Chevron* deference to the FCC's regulatory classification — although, as we explained in our petition for a writ of certiorari, this case does provide an opportunity to address that issue. If the Court reaches the *stare decisis* issue, it should state that the court of appeals erred. *Chevron* rests on the premise that statutory silence or ambiguity reflects an implicit delegation of legislative authority. Thus, *stare decisis* no more precludes a court from deferring to a reasonable administrative interpretation of a statute committed to an agency's administration than it precludes a court from obeying subsequent statutory amendments.

OPINION AND ORDER BELOW

The opinion of the Court of Appeals (Pet. App. 1a-39a) is reported at 345 F.3d 1120. The FCC's order (Pet. App. 40a-203a) is reported at 17 FCC Rcd 4798.[1]

JURISDICTION

The court of appeals entered its judgment on October 6, 2003. Pet. App. 1a. The court of appeals denied petitions for rehearing and rehearing *en banc* on March 31, 2004. *Id.* at 204a. On June 18, Justice O'Connor extended the time within which to file a petition for a writ

[1] All references to "Pet. App." are to the appendix to the petition in No. 04-281.

of certiorari to and including July 29, 2004. On July 20, 2004, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including August 30, 2004. The petition was filed on that date. It was granted on December 3, 2004, together with the Government's petition in No. 04-281. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Portions of relevant provisions of the Communications Act of 1934 are reprinted at Pet. App. 208a-213a.

STATEMENT

1. When residential consumers first began to use the Internet in the early 1990s, they generally did so over telephone "dial-up" connections, using a regular telephone line to connect to a point of presence of an Internet Service Provider ("ISP") simply by having their computer dial a local telephone number associated with the ISP's modem pool.[2] The ISP would then convert the telephone signal to an Internet protocol signal and transmit it to the selected destination on the Internet. Dial-up service, however, was relatively slow: its speed was impeded by the limited bandwidth of voice circuits over telephone companies' copper wire.[3]

In the ensuing years, cable television companies spent billions of dollars upgrading their facilities to support "cable modem service." *See* Pet. App. 58a (¶ 12). This service, which cable operators began to make available around 1998, allows subscribers to access the Internet by connecting a traditional coaxial cable television wire to a

[2] *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Notice of Inquiry, 15 FCC Rcd 19287, ¶ 6 (2000) ("*Notice of Inquiry*").

[3] *See id.* ¶ 8; Pet. App. 4a.

computer via a cable modem. *See* Pet. App. 60a (¶ 12). The coaxial connection allows much greater bandwidth — and thus greater speed — than a dial-up connection. *See* Pet. App. 54a (¶ 10). Moreover, the connection is "always on": the user need not "dial up" an ISP to initiate a session. *See Notice of Inquiry* ¶ 8. These qualities made cable modem service very popular, and its growth has been explosive.[4]

The success of cable modem service prompted telephone companies to introduce a high-speed (or "broadband") Internet service of their own: Digital Subscriber Line or DSL service.[5] DSL is provided over regular copper telephone wire, but, like cable modem service, it is nonetheless "always on" and enables transmission speeds much greater than traditional dial-up. *See* Pet. App. 50a (¶ 9). Later, other forms of high-speed Internet service developed, including service provided via fiber, terrestrial wireless, satellite, and power lines.[6] High-speed Internet service is now robustly competitive: "the competitive nature of the broadband market, including new entrants using new technologies, is driving broadband providers to

[4] *See* Industry Analysis and Tech. Div., Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of June 30, 2004*, at Table 1 (rel. Dec. 22, 2004) (available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd1204.pdf) (counting 18.6 million subscribers by June 2004).

[5] *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, Memorandum Opinion and Order, 15 FCC Rcd 9816, ¶ 117 (2000).

[6] *See generally Availability of Advanced Telecommunications Capability in the United States*, Fourth Report to Congress, 19 FCC Rcd 20540 (2004).

offer increasingly faster service at the same or even lower retail prices."[7]

2. In dial-up communications, an important part of the business of ISPs like respondents Earthlink and Brand X consisted of connecting and converting traditional "circuit-switched" voice communications to the "packet-switched" communications of the Internet. They could be in this business because common-carrier telephone companies were already making available stand-alone voice circuits that could also be used for data transmission. Indeed, having held out basic connectivity to all comers, telephone companies were prohibited (by Title II of the Communications Act) from denying ISPs this connectivity.[8] The FCC also had special rules relating to computer-related services (the so-called *Computer II* rules) that obligated telephone companies to continue making circuits available at tariffed rates.[9]

Things were different, however, insofar as cable modem service was concerned. Unlike telephone companies, cable operators had never provided basic connectivity on a common-carrier basis, and they were offering cable modem service on an integrated basis. *See id.* at 70a (¶ 20). Subscribers could still access content provided by unaffiliated ISPs, *see id.* at 78a (¶ 25), but unaffiliated ISPs' dial-up conversion services were not used or needed to allow cable subscribers to connect to the Internet.

Some ISPs responded by requesting that regulators force cable operators to provide transport in much the

[7] *Id.* at 20552.

[8] *See generally* 47 U.S.C. § 201, *et seq.*

[9] *See generally Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384 (1980) ("*Computer II*").

same way telephone companies did.[10] These ISPs acknowledged that cable modem service, like dial-up Internet access service, constituted an "information service" ("the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," 47 U.S.C. § 153(20)), which the Communications Act left unregulated. But, ISPs argued, cable modem service also includes a common-carrier service — or, in the words of the newly enacted Telecommunications Act of 1996, a "telecommunications service," defined as "the offering of telecommunications for a fee directly to the public." 47 U.S.C. § 153(46). "Telecommunications," in turn, is separately defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(43).

Relying on these definitions, ISPs and others argued that cable operators providing cable modem service should be treated as "common carriers," which in their view meant that cable operators were required to provide "access" to unaffiliated ISPs. Cable operators, for their part, argued that cable modem service did not constitute or contain a "telecommunications service." They argued that common carrier regulation would impose a grave burden, thereby deterring them from investing in facilities necessary to increase the proliferation of broadband service. They argued that nothing in the statutory definitions implied that Congress had meant to impose these burdens,

[10] *See generally Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee*, Memorandum Opinion and Order, 14 FCC Rcd 3160, ¶¶ 75-91 (1999).

and that, if Congress had meant to do so, it would have done so expressly — not through relatively indeterminate definitions.

Courts reached different conclusions concerning cable modem service's classification. The Eleventh Circuit held that cable modem service constituted only an "information service."[11] But, in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), a decision that would later have important repercussions for the instant case, the Ninth Circuit stated that, although cable modem service was an "information service," it had a separate "telecommunications service" component. *See id.* at 878.

3. Recognizing the need "to develop a national legal and policy framework in light of recent federal court opinions that have classified cable modem service in varying manners," the FCC in September 2000 opened a rulemaking proceeding with the goal of determining "what regulatory treatment, if any, should be accorded to cable modem service." *Notice of Inquiry* ¶¶ 1, 2. By doing so, the FCC intended "to instill a measure of regulatory stability in the market to encourage investment in all types of high-speed networks and innovation in high-speed services." *Id.* ¶ 2. In the next 18 months, the agency received over 250 written submissions and conducted numerous meetings with industry, government, and consumer advocates. *See* Pet. App. 9a, 42a-43a. The FCC's rulemaking proceeding resulted in a decision released on March 15, 2002 — the order here under review.

a. In that order, the FCC determined that "cable modem service as currently provided is an . . . information

[11] *See Gulf Power Co. v. FCC*, 208 F.3d 1263, 1275-78 (11th Cir. 2000), *rev'd on other grounds, National Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002).

service, . . . and that there is no separate telecommunications service offering to subscribers or ISPs." *Id.* at 88a (¶ 33). The FCC reached this outcome by taking account of "the nature of the functions that the end user is offered." *Id.* at 94a (¶ 38). Cable modem service, the FCC observed, offered the same functions as dial-up Internet access: "[e]-mail, newsgroups, the ability for the user to create a web page," and access to the "DNS" or Domain Name System (the central database that enables web-browsing). *Id.* at 93a (¶ 38). Thus, the FCC found that, like dial-up service, "cable modem service is an offering of Internet access service, which combines the transmission of data with computer processing, information provision, and computer interactivity." *Id.* at 94a (¶ 38). As such, the FCC held, cable modem service met the Act's definition of an "information service." *Id.* at 95a (¶ 38).

The FCC rejected arguments that cable modem service "include[s] an offering of telecommunications service to subscribers." *Id.* (¶ 39). As the FCC noted, "[w]e are not aware of any cable modem service provider that has made a stand-alone offering of transmission for a fee directly to the public." *Id.* at 97a (¶ 40). The FCC acknowledged that cable modem service includes a "telecommunications" component: by definition, any "information service" is provided "via telecommunications." *See id.* at 96a (¶ 39). But, the agency reasoned, "[t]hat telecommunications component is not . . . separable from the data-processing capabilities of the service. As provided to the end user the telecommunications is part and parcel of cable modem service and is integral to its other capabilities." *Id.* "Our analysis, like the relevant statutory definitions," the FCC concluded, "focuses . . . on the single, integrated information service that the subscriber to cable modem service receives." *Id.* at 98a (¶ 41).

The FCC also rejected arguments that, if cable operators were not providing a "telecommunications service," they should be forced to "create" one. *See id.* at 99a (¶ 42). Some ISPs had argued that this result was required by the FCC's *Computer II* rules, which, they said, "required common carriers that provide information services to offer the underlying telecommunications as a stand-alone service." *Id.* But the *Computer II* rules, the FCC observed, by their terms applied only to "traditional wireline common carriers providing telecommunications services (*e.g.*, telephony) separate from their provision of information services." *Id.* at 100a (¶ 43). The FCC "decline[d] to extend *Computer II*" to cable operators offering "an integrated combination of transmission and the other components of cable modem service." *Id.*

b. The FCC acknowledged that, in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), the Ninth Circuit had reached a contrary conclusion. *Id.* at 114a (¶ 56). In that case, the issue had been whether a municipality was allowed to impose ISP "access" obligations on a cable operator seeking to transfer its cable franchise — a question that, in the end, the court answered in the negative. *See id.* at 880. In an opinion by Judge Thomas, the court had apparently concluded that, to resolve this question, it had to determine whether the service included a separate "telecommunications service" component. *Id.* at 878-79. At the outset, the court had noted that, because the FCC had not yet addressed the issue, it did not owe "deference to an administrative agency's statutory construction pursuant to the *Chevron* doctrine." *Id.* at 876. Thus unconstrained, the court had stated that, when a cable operator "provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act." *Id.* at 878.

The FCC did not feel bound by the Ninth Circuit's classification. The FCC noted that, whereas it was "considering the broad issue of the appropriate national framework for the regulation of cable modem service, the *Portland* court had considered a much narrower issue — whether a local franchising authority . . . had the authority to condition its approval of a cable operator's merger on the operator's grant of multiple ISP access." Pet. App. 114a (¶ 56). Moreover, said the FCC, because the *Portland* parties had not briefed the classification issue, "[t]he Ninth Circuit's decision was based on a record that was less than comprehensive." *Id.* at 115a (¶ 57). In addition, the FCC viewed the Ninth Circuit's "telecommunications service" classification as unnecessary: "[t]he Ninth Circuit could have resolved the narrow question before it by finding that cable modem service is not a cable service." *Id.* at 115a-116a (¶ 58). In any event, the FCC disagreed with the Ninth Circuit on the merits: "Though by definition an information service includes a telecommunications component, the mere existence of such a component, without more, does not indicate that there is a separate offering of a telecommunications service to the subscriber." *Id.* at 116a (¶ 58).

4. Numerous parties sought judicial review pursuant to the Hobbs Act, *see* 47 U.S.C. § 402(a); 28 U.S.C. § 2341, *et seq.*: in all, seven petitions for review were filed in the Third, Ninth, and D.C. Circuits. *See* Pet. App. 10a. Pursuant to the random selection procedure specified in 28 U.S.C. § 2112(a)(3), the Judicial Panel on Multidistrict Litigation consolidated all petitions in the Ninth Circuit — the one court that, prior to the FCC's order, had held that cable modem service included a "telecommunications service." *See* Pet. App. at 11a. The undersigned cable-industry petitioners intervened and filed a joint brief in support of the FCC.

In a *per curiam* opinion, a panel of the Ninth Circuit affirmed in part and vacated in part. *Id.* at 22a. The court began its analysis by observing that, "[n]ormally, when we review an agency's interpretation of the statute it is charged with administering, we apply the two-step formula set forth by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*" *Id.* at 11a (citation omitted). The court went on to hold, however, that, in light of the prior *Portland* decision, it could not follow the *Chevron* framework in this case. Because "three-judge panels are bound by the holdings of earlier three-judge panels," the court reasoned, "*Portland*'s construction of the Communications Act remains binding precedent within this circuit, even in light of the FCC's contrary interpretation of the statute." *Id.* at 19a, 21a.

The court of appeals found support for its result in *Neal v. United States*, 516 U.S. 284 (1996), in which this Court stated that, "'[o]nce we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law.'" Pet. App. 20a (quoting *Neal*, 516 U.S. at 295). "Notwithstanding the Supreme Court's use of the term 'we,'" the court of appeals stated, "there is nothing to suggest that *Neal*'s rule should apply only when it is the Supreme Court (and not the courts of appeals) construing the statute in question, and the Court itself has never asserted that the power authoritatively to interpret statutes belongs to it alone." Pet. App. 20a.

Having concluded that it was required to adhere to *Portland*, the panel viewed its analysis as being at an end. "Because the Commission's Declaratory Ruling agreed with our conclusion [in *Portland*] that cable broadband service is not 'cable service,' but disagreed with our conclusion that it is in part 'telecommunications service,'" the

court affirmed in part, vacated in part, and remanded for further proceedings. *Id.* at 21a-22a. Saying that "the various petitioners' claims all revolve around the FCC's central classification decision," the court "decline[d] . . . to consider their remaining claims . . . , leaving them for reconsideration by the FCC on remand." *Id.* at 22a n.14.

In a separate concurrence, Judge O'Scannlain agreed that the Ninth Circuit's *stare decisis* principles required the panel to follow *Portland*, but criticized those principles as "produc[ing] a result strikingly inconsistent with *Chevron*'s underlying principles." *Id.* at 22a (internal quotation marks and citation omitted). *Stare decisis*, Judge O'Scannlain noted, ordinarily serves as a "check on judicial power," but "adherence to *stare decisis* in the present case — coming as it does in a decision that determines the outcome of seven different petitions for review from three different circuits consolidated and assigned randomly to this court by the Judicial Panel on Multidistrict Litigation — appears to aggrandize, rather than limit our power over an admittedly complicated and highly technical area of telecommunications law." *Id.* at 23a-24a. "Regardless of one's view of the wisdom of the FCC's declaratory ruling," Judge O'Scannlain concluded, "it cannot be denied that our holding today effectively stops a vitally important policy debate in its tracks, at least until the Supreme Court reverses us or Congress decides to act." *Id.* at 23a.

Judge Thomas, the author of the *Portland* opinion, also concurred separately. In his view, the case before the court did not "implicat[e] *Chevron* deference, not only for the reasons noted in [the court's] unanimous opinion, but also because [the classification question] is a question of pure statutory interpretation." *Id.* at 25a-26a. Regardless, Judge Thomas believed that "the statutory definitions, combined with the overall regulatory and legislative

context, compel the result that cable modem service includes a telecommunications service component." *Id.* at 39a. Thus, Judge Thomas stated, "even if we were writing on a clean slate, my conclusion would be the same as the one we reached in *City of Portland* as to the meaning of the statute." *Id.*

5. After the Ninth Circuit denied *en banc* review, the FCC and the United States filed a petition for review in this Court (No. 04-281), presenting the question "[w]hether the court of appeals erred in holding that the Federal Communications Commission had impermissibly concluded that cable modem service is an 'information service,' without a separately regulated telecommunications service component, under the Communications Act of 1934, 47 U.S.C. 151 *et seq.*" Fed'l Pet. at I. Presenting a similar question, the undersigned cable-industry parties filed a petition of their own (No. 04-277). *See* Cable Pet. at i. By order dated December 3, 2004, the Court granted both petitions. The cases were consolidated and a total of one hour was allotted for oral argument.

SUMMARY OF ARGUMENT

This Court should review the FCC's decision under the familiar *Chevron* framework. Applying that framework, the FCC's decision readily passes muster. The judgment of the court of appeals should therefore be reversed.

I

A. The FCC correctly held that cable modem service constitutes an "information service," a term defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." Cable modem service provides the same functionality as traditional dial-up Internet service, which, because it con-

stitutes an offering of a capability for interacting with information via telecommunications, the FCC long ago correctly classified as an "information service." In the order under review, the FCC reasonably extended that classification to cable modem service.

The FCC also acted lawfully in determining that cable modem service does not include a separate "telecommunications service" component. "Telecommunications" is an input into any information service: all information services involve computer functionality provided "via telecommunications." Viewing all information services as containing a separate "telecommunications service" component would undermine the longstanding policy of leaving information service providers unregulated.

The FCC's view is not at odds with the definition of "telecommunications service" as "the offering of telecommunications for a fee directly to the public." To the contrary, when an input contributes to the making of (and loses its separate existence in) a finished product, and when only the finished product is offered for sale, it is most logical to say that the input is not being offered for a fee directly to the public.

In the order under review, the FCC permissibly extended that interpretation to cable modem service. Nothing in the statutory definition suggests that cable operators who provide Internet service over their own cable systems should be treated differently from other Internet service providers.

B. Respondents' arguments to the contrary would each have the consequence that every information service would include a separate "telecommunications service" component, contrary to the FCC's long-standing policy. Respondents' argument for avoiding that consequence — that there is a separate "telecommunications service" only

when an information service provider relies on its own facilities — has no basis in the statutory text. The unintended consequence of respondents' reading and their inability to avoid it in a plausible way reflect their arguments' lack of soundness.

Besides, each of respondents' arguments fails on its own terms. *First*, the FCC did not impermissibly add words (supposedly, "on a stand-alone basis") to the definition of "telecommunications service." Instead, the FCC merely gave content to ambiguous language. *Second*, the FCC's reading is not undermined by the "via telecommunications" language in the definition of "information service." Cable modem service does involve "telecommunications," but there is no "offering of telecommunications for a fee directly to the public" if "telecommunications" is not offered separately. *Third*, the ambiguous snippets of legislative history on which respondents have relied are not probative: they relate to language in a bill that did not become law. *Finally*, the FCC's reading is not inconsistent with Section 706 of the Telecommunications Act. Although that provision calls on "State commission[s] with regulatory jurisdiction over telecommunications services" to promote "advanced telecommunications capability," those words do not imply that Congress believed that all capabilities promoted are "telecommunications services."

C. The FCC also did not act arbitrarily by refusing to rely on its *Computer II* policies to force cable operators to provide a separate telecommunications service. Under those policies, telecommunications inputs underlying information services must be provided separately only if the information services are offered by "carriers that own common carrier transmission facilities." Because cable operators are not classified as common carriers, the FCC reasonably determined that, by their terms, the *Computer*

II policies are inapplicable to cable operators providing cable modem service.

The FCC also acted reasonably in refusing to extend the *Computer II* policies, which were written at a time when information services could generally be provided only over the networks of monopoly telephone common carriers. It makes no sense to extend access policies to competitive cable networks, particularly when, in the FCC's expert view, broadband services are best promoted by leaving them unregulated, when that view has yielded robust broadband competition, and when the FCC is considering eliminating *Computer II* even with respect to telephone companies.

Nor is the FCC's refusal to extend *Computer II* inconsistent with the "regardless of the facilities used" language in the definition of "telecommunications service." This language determines what services constitute a "telecommunications service." It has no bearing on the question whether an entity should be compelled to provide a "telecommunications service" when it has chosen not to do so.

II

To dispose of this case, the Court need not address the *stare decisis* question that kept the Ninth Circuit from extending *Chevron* deference. If the Court addresses the issue, however, it should state that the Ninth Circuit erred.

A. Except where its precedent established a statute's clear meaning, this Court has never held that *stare decisis* trumps *Chevron* deference. Allowing precedent to have such effect would encourage regulated parties to race to the courthouse in the hopes of obtaining an interpretation by a court of their choosing before the agency has had an opportunity to interpret the statute. More fundamentally,

this Court held in *Chevron* that a statutory silence or ambiguity signals an implicit delegation of legislative authority. Judicial deference to the exercise of delegated legislative authority no more threatens judicial supremacy than does obeyance to the exercise of retained legislative authority.

B. *Stare decisis* certainly should not trump *Chevron* deference insofar as the precedent of lower courts is concerned. This Court has indicated that agencies retain *Chevron* discretion even after a lower court interprets a statute. That understanding is correct: any contrary view would impede uniformity among the circuits, place administrative agencies in an untenable position, and unnecessarily generate appeals to this Court.

ARGUMENT

I. UNDER THE DEFERENTIAL *CHEVRON* STANDARD, THE FCC'S CLASSIFICATION DECISION MUST BE UPHELD.

Now that this Court has accepted this case for review, the Ninth Circuit's *Portland* precedent no longer places any weight on the scale: plainly, this Court is not bound to follow the precedent of courts of appeals.[12] Thus, this

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[12] *See, e.g., INS v. Aguirre-Aguirre*, 526 U.S. 415, 428-31 (1999) (reversing decision in which court of appeals had refused to defer to agency's decision whose analysis contravened circuit precedent); *Chevron*, 467 U.S. at 841-42 (reversing decision in which court of appeals had set aside agency's decision as contrary to "two of [the court of appeals'] precedents," explaining that "[t]he basic legal error of the Court of Appeals was to adopt a static judicial definition of the term 'stationary source' when it had decided that Congress itself had not commanded that definition"); Richard J. Pierce, Jr., I *Administrative Law* § 3.6, at 185 (4th ed. 2002) ("The [Supreme] Court . . . frequently overrules circuit court precedents and upholds agency constructions that are inconsistent with circuit court

Court must review the FCC's decision under the familiar *Chevron* framework. Applying that framework, the FCC's decision readily passes muster.

A. The FCC's Statutory Reading Is, at a Minimum, a Permissible One.

1. No controversy surrounds the FCC's determination that, when a cable operator provides subscribers with cable modem service, those subscribers receive an "information service." As the FCC correctly explained, cable operators providing cable modem service offer subscribers the same functionality as providers of traditional dial-up Internet access.[13] That functionality includes the ability to create a webpage and to access e-mail, newsgroups, and the Domain Name System (or DNS), which enables browsing of the World Wide Web.[14] In a 1998 order, the FCC held that the bundle of those functionalities constitutes an "information service" when provided on a dial-up basis.[15] In the order under review, the FCC simply extended the same classification to Internet service provided over cable facilities.

That classification was undoubtedly permissible. "Information service" is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[16] Each of the functions encompassed within Internet access service involves "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information." It is therefore not surprising that all parties here accept the "information service" classification, as did the *Portland* court and each of the judges on the panel below.

2. What *is* contested is the FCC's next determination: that, when a cable operator provides cable modem service, it does not provide the end user with a "telecommunications service." Respondents' claim that this view is foreclosed by the statute's unambiguous language faces an uphill (and, as shown below, losing) battle. This Court has noted that the Telecommunications Act of 1996 is "in many important respects a model of ambiguity."[17] Moreover, just three Terms ago (in the *Gulf Power* case, involving regulation of the rates that cable operators pay owners of utility poles), the Court characterized the specific issue presented here — the regulatory classification of cable modem service — as a particularly "hard questio[n]" involving "subject matter" that is "technical, complex, and dynamic."[18] In connection with such questions, deference is particularly appropriate.[19]

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precedents. . . . It has also criticized a circuit court for applying a circuit precedent, rather than conferring *Chevron* deference on an agency construction that conflicted with the circuit precedent.").

[13] *See* Pet. App. 94a (¶ 38) ("cable modem service is an offering of Internet access service").

[14] *See id.* at 91a-93a (¶ 37).

[15] *See Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶¶ 73-80 (1998) ("*Report to Congress*").

[16] 47 U.S.C. § 153(20).

[17] *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999).

[18] *National Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 338 (2002).

[19] *See, e.g., Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("broad deference is all the more warranted when, as here, the regulation concerns a complex and highly technical regulatory program, in which the identification and classification of relevant criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns") (internal quotation marks omitted).

3. The FCC has long held that the terms "information service" and "telecommunications service" are mutually exclusive: a service that constitutes an "information service" does not also constitute or contain a "telecommunications service."[20] As the FCC put it in its 1998 order, "telecommunications is an input in the provision of an information service."[21] Viewing that input as a separate service would have the effect of turning all providers of information services into providers of "telecommunications service," contrary to long-standing FCC policy leaving providers of information services unregulated.[22] If Congress had intended to overturn that policy, the FCC correctly reasoned, it no doubt would have made that intent express.[23]

The FCC's decision certainly constitutes a reasonable interpretation — and indeed reflects the best reading — of the definition of "telecommunications service" as "the of-

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[20] *See* Pet. App. 97a-98a (¶ 41).

[21] *Report to Congress* ¶ 69 n.138; *id.* ¶ 81 ("In offering service to end users, . . . [ISPs] do more than resell . . . data transport services. They conjoin the data transport with data processing, information provision, and other computer mediated offerings, thereby creating an information service.").

[22] *See id.* ¶ 45.

[23] *See id.*; *see also Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes."); *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 613 (1991) ("As a matter of statutory drafting, if Congress had intended to curtail in a particular area the broad rulemaking authority [it has] granted . . . , we would have expected it to do so in language expressly describing [such] an exception."); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 693 (1983) (had "Congress intended such a novel result . . . it would have said so in far plainer language than that employed here").

fering of telecommunications for a fee directly to the public."[24] An "offering" is "something presented for . . . sale."[25] When a product is offered only as part of a bundle (and not by itself), it is entirely logical to say that the product is not being offered for a fee directly to the bundle's purchasers. That is particularly true when the product is an input that loses its separate existence in a finished product.[26]

4. In the order under review, the FCC simply extended this policy to cable operators that use their own facilities to provide Internet service.[27] The agency correctly saw no distinction in that difference: nothing in the statute suggests that providers of Internet service that own cable facilities should be treated differently from providers of Internet service that do not.[28] As the FCC correctly noted, the statutory definition of "telecommunications ser-

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[24] 47 U.S.C. § 153(46).

[25] *Random House Webster's Unabridged Dictionary* 1344 (2001).

[26] *See, e.g., Bestfoods v. United States*, 260 F.3d 1320, 1326 (Fed. Cir. 2001) ("[W]e cannot conclude that it was arbitrary or capricious for Customs to consider substantially-transformed ingredients to be products of the country of manufacture, even if the raw materials come from some foreign location."); *McCallum v. City of Athens*, 976 F.2d 649, 657 (11th Cir. 1992) ("[N]either the chlorine nor fluoride in the present case is resold as chlorine or fluoride. Rather the chemicals are combined with water and transformed into an entirely distinct commodity. . . . Undoubtedly, . . . customers believe that they are purchasing water, not chlorine and fluoride.").

[27] *See* Pet. App. 95a-98a (¶¶ 39-41).

[28] *See* Pet. App. 98a (¶ 41) ("we do not believe that the fact that cable modem service is provided over the cable operator's own facilities, without more, necessarily creates a telecommunications service separate and apart from the cable modem service")

vice" turns not "on the particular types of facilities used" but "on the function that is made available."[29]

B. Arguments That the Statute Compels a Different Classification Are Mistaken.

Judge Thomas and the various respondents have relied on a number of disparate arguments supposedly showing that the FCC's interpretation is impermissible as a matter of *Chevron* "Step One." As shown below, each of respondents' arguments fails.

1. Each of these arguments has a common flaw: if credited, they would have the effect of turning all information service providers into providers of "telecommunications service." For example, even dial-up ISPs provide end users a combination of computer processing and data transmission.[30] Yet, as explained above, long-standing FCC policy leaves ISPs and other providers of information services unregulated. Respondents' arguments are facially at odds with that policy.

In an effort to avoid this consequence of their own reasoning, respondents attempt to limit it to ISPs that provide Internet access service *over their own facilities*.[31] That notion, however, has no basis in the statute: as the FCC correctly noted, the definition of "telecommunications service" does not distinguish between facilities-based and

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[29] *See* Pet. App. 90a (¶ 35); *see also id.* 98a (¶ 41) ("the relevant statutory definitions . . . focu[s] . . . on the single, integrated information service that the subscriber to cable modem service receives").

[30] *See generally Report to Congress* ¶ 66 ("Internet service providers typically utilize a wide range of telecommunications inputs.").

[31] *See* CPUC Br. in Opp. at 21 n.8; CPUC Ninth Circuit Br. at 27-28, 31; Earthlink Ninth Circuit Br. at 39 n.12; Brand X Ninth Circuit Br. at 31 n.35; Brand X Ninth Circuit Reply Br. at 18; Earthlink Ninth Circuit Reply Br. 19-20 n.11.

non-facilities-based ISPs. The unintended consequence of respondents' reading and their inability to avoid it in a plausible way indicate that respondents' reading of the statute is unsound.

2. Besides, as shown below, each of respondents' arguments fails on its own. *First*, it has been argued that the FCC read additional words into the statute — particularly, that the definition of "telecommunications service" does not include the words "on a stand-alone basis."[32] This argument has no substance. Whenever statutory language is ambiguous, interpreting its meaning requires the use of additional words — otherwise, one would simply repeat ambiguous words without adding clarity.[33] Here, the FCC used the additional words to explain that "offering telecommunications for a fee directly to the public" means offering telecommunications on a stand-alone basis, rather than as one ingredient in an integrated product.

Second, it has been argued that the "via telecommunications" language in the "information service" definition undermines the FCC's reading. If cable modem service is provided "via telecommunications," the argument goes, it must involve transmission of information "of the user's choosing." That "user," respondents have argued, surely is the subscriber,[34] who for that reason must be offered

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[32] *See, e.g.*, Pet. App. 31a (Thomas, J., concurring); Earthlink Br. in Opp. at 18; CPUC Br. in Opp. at 20.

[33] *See, e.g., Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 47 (2002) (far from having "insert[ed] words into the statute," agency carried out its duty to "resolve any ambiguities"); *West v. Bowen*, 879 F.2d 1122, 1125, 1128 (3rd Cir. 1989) (rejecting argument that agency had inappropriately "inserted into the statute" additional words, holding agency's interpretation to be "reasonable").

[34] *See* Earthlink Br. in Opp. at 23 ("When an Internet subscriber participates in an on-line auction, posts a message to an electronic

"telecommunications" (and thus receive a "telecommunications service"). As already explained, however, the occurrence of "telecommunications" in the provision of cable modem service does not mean that cable operators offer telecommunications for a fee directly to their subscribers.

Third, it has been argued that legislative history contradicts the FCC's result.[35] Primary reliance is placed on two snippets in the Senate Report saying that (1) "[t]he underlying transport and switching capabilities on which [information services] are based . . . are included in the definition of 'telecommunications services,'" and (2) "'[t]elecommunications service' does not include information services . . . but does include the transmission, without change in the form or content, of such services."[36] These ambiguous snippets are entirely irrelevant: they commented on a definition different from the one that became law.[37]

Finally, it has been argued that Section 706(a) — which calls on "each State commission with regulatory jurisdiction over telecommunications services" to promote "advanced telecommunications capability"[38] — indicates that

bulletin board, or sends an email, it is that subscriber, and nobody else, who determines what information is sent, and where.").

[35] *See* Pet. App. 36a-37a (Thomas, J., concurring); CPUC Br. in Opp. at 22; CPUC Ninth Circuit Br. at 29-30.

[36] *See* S. Rep. No. 104-23, at 18 (1995).

[37] *Id.* at 79.

[38] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 706(a) (47 U.S.C. § 157 note) ("The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.").

Congress intended to subject cable modem service to common-carrier regulation.[39] The argument is that cable modem service is a form of "advanced telecommunications capability," and that it would be strange for Congress to address bodies "with regulatory jurisdiction over *telecommunications services*" if cable modem service were not a "telecommunications service." Although Section 706 does address bodies "with regulatory jurisdiction over telecommunications services," that hardly implies that Congress believed that all capabilities promoted are "telecommunications services." To the contrary, Congress may have believed that regulators should stay out of the way precisely because some advanced telecommunications capability might not be telecommunications services.

C. The FCC Did Not Act Arbitrarily by Refusing To Extend Its *Computer II* Policies.

Besides arguing that the statute prohibits the FCC's interpretation, certain respondents have argued that the FCC acted in an arbitrary and capricious manner — in violation of 5 U.S.C. § 706(2)(A) — by failing to adhere to previously adopted *Computer II* policies. The primary argument appears to be that, if cable operators do not "in fact offer transmission service on a stand-alone basis," the FCC should have used the *Computer II* policies to force them to "create a stand-alone transmission service"[40] — either because those policies by their terms apply to cable operators or because the FCC should have extended

[39] *See* CPUC Br. in Opp. at 22-23, 25; CPUC Ninth Circuit Br. at 31-34.

[40] Pet. App. 98a-99a (¶ 42).

them.[41] This set of arguments is wrong too, as the following background makes clear.

1. In the 1960s, technological progress made it possible to use telephone lines to connect mainframe computers to remote terminals. This raised two questions for the FCC: (1) whether computer services made available over telephone lines should be subjected to regulation, and (2) whether the computer-services business should be open to telephone companies.[42] In connection with the former question, the FCC was reluctant to regulate competitive parts of the economy only indirectly related to its communications mandate.[43] On the latter question, the FCC feared that, if telephone companies were permitted to hold a competitive stake in the adjacent industry, they would acquire an incentive to deny computer-services rivals essential telephone inputs, thereby leveraging their market power from the naturally monopolistic telephone industry into the competitive computer-services industry.[44]

In the end, the FCC decided not to regulate the computer-services industry: "enhanced services" (the rough equivalent of today's "information services") would remain unregulated — even though they involved "communications by wire" and were thus within the agency's regulatory jurisdiction.[45] At the same time, the FCC decided that it should permit telephone companies to provide computer services, albeit subject to certain regulatory

[41] *See, e.g.*, Earthlink Br. in Opp. at 19-20; Brand X Br. in Opp. at 25-26; CPUC Br. in Opp. at 24; CPUC Ninth Circuit Reply Br. at 11-12.

[42] *See Computer II* ¶ 16.

[43] *See id.* ¶ 116.

[44] *See id.* ¶¶ 15, 18.

[45] *See id.* ¶¶ 114, 119, 121, 124, 127.

safeguards. In particular, the FCC stated that all "carriers that own common carrier transmission facilities" should continue to make available on tariffed terms the "basic" telecommunications services underlying their "enhanced" computer-related services.[46] That way, computer-service rivals would have equal access to telephone inputs.

Later, the FCC was compelled to add an auxiliary principle: that telephone companies could not avoid the tariffing requirement by adding computer functionality to their basic services. In drawing the line between "basic" and "enhanced," the FCC had held that, whenever a basic service is bundled with an enhanced service, the bundle constitutes an enhanced service.[47] Pointing to this logic, telephone companies sought to liberate themselves from the tariffing requirement by arguing that, if they added enhanced services to basic services, the product was enhanced and therefore unregulated. The FCC disagreed: telephone companies would not be allowed to skirt their pre-existing obligations in this way.[48]

[46] *See id.* ¶ 231 ("those carriers that own common carrier transmission facilities and provide enhanced services . . . must acquire transmission capacity pursuant to the same prices, terms, and conditions reflected in their tariffs when their own facilities are utilized"). Except insofar as common carriers owned by AT&T or GTE were concerned, this policy was never formally codified in a regulation. *See id.* at pp. 498-99.

[47] *See, e.g.*, *Independent Data Communications Mfrs. Ass'n, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 13717, ¶ 18 (CCB 1995) (providers of "enhanced protocol processing services in conjunction with basic transmission services have historically been treated as unregulated enhanced service providers").

[48] *See, e.g.*, *id.* ¶ 44 (contrary rule "would allow circumvention of the *Computer II* and *Computer III* basic-enhanced framework"); *Filing and Review of Open Network Architecture Plans*, Memorandum

2. By its terms, the *Computer II* tariffing requirement applies only to "carriers that own common carrier transmission facilities."[49] The FCC in the order under review interpreted the *Computer II* regime as imposing duties only on "traditional wireline common carriers,"[50] and viewed cable operators as not being encompassed within that term.[51] These determinations — an agency's interpretations of not even its own rules but its own policies — are entitled to an extreme level of deference.[52] And, because cable operators have traditionally not been viewed as being common carriers,[53] it is eminently reasonable to say that cable systems are not "common carrier transmission facilities."

It was similarly reasonable for the FCC to refuse "to extend *Computer II*" to cable operators.[54] As the FCC explained, "the core assumption underlying the *Computer*

Opinion and Order, 4 FCC Rcd 1, ¶ 274 (1988) ("the addition of . . . enhancements . . . to a basic service neither changes the nature of the underlying basic service when offered by a common carrier nor alters the carrier's tariffing obligations").

[49] *Computer II* ¶ 231.

[50] *See* Pet. App. 100a (¶ 43); *id.* at 100a n.169 ("By 'wireline,' we refer to services provided over the infrastructure of traditional telephone networks").

[51] *See id.* at 100a (¶ 43) ("The Commission has never before applied *Computer II* to information services provided over cable facilities."); *id.* at 50a, 58a-59a (¶¶ 9, 12) (explaining difference between traditional wireline facilities and cable facilities).

[52] *See, e.g., Auer v. Robbins*, 519 U.S. 452, 461 (1997) (agency's interpretation of its own regulations is "controlling unless plainly erroneous or inconsistent with the regulation") (internal quotation marks omitted).

[53] *See* 47 U.S.C. § 541(c); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 169 n.29 (1968); *Philadelphia Television Broad. Co. v. FCC*, 359 F.2d 282, 284 (D.C. Cir. 1966).

[54] Pet. App. 100a (¶ 43).

Inquiries was that the telephone network is the primary, if not exclusive, means through which information service providers can gain access to their customers."[55] Imposing access requirements on such a network made good sense at a time when telephone companies had unchallenged bottleneck monopoly power that was restrained only by rate-of-return regulation allowing them to earn virtually risk-less returns on investment. By contrast, it makes no sense to extend such requirements to cable operators who invested billions of risk-bearing dollars in upgrading their facilities to offer broadband service in competition with incumbent telephone companies[56] — particularly when, in the FCC's expert view, "broadband services should exist in a minimal regulatory environment,"[57] when that view has spawned robust competition,[58] and when the FCC is considering eliminating *Computer II* altogether.[59]

Contrary to the arguments of respondents,[60] the FCC's refusal to extend *Computer II* to cable operators is not at odds with the "regardless of the facilities used" language in the definition of "telecommunications service."[61] That

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[55] *Id.* at 101a (¶ 44) (emphasis omitted).

[56] *See, e.g., USTA v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002) ("nothing in the Act appears a license to the Commission to inflict on the economy the sort of costs [inherent in imposing access obligations] under conditions where [the Commission has] no reason to think doing so would bring on a significant enhancement of competition").

[57] Pet. App. 47a (¶ 5).

[58] *See supra*, pp. 4-5.

[59] *See* Pet. App. 104a (¶ 47 n.179).

[60] *See, e.g.*, Brand X Br. in Opp. at 26; CPUC Br. in Opp. at 24; Earthlink Ninth Circuit Br. at 42-44; Brand X Ninth Circuit Br. at 32 n.37; Brand X Ninth Circuit Reply Br. at 19; CPUC Ninth Circuit Br. at 36-39; CPUC Ninth Circuit Reply B. at 12, 16.

[61] 47 U.S.C. § 153(46).

language is part of a definition: it demarcates what *is* a "telecommunications service" by making clear that a service otherwise falling within the definition is a "telecommunications service" even if it is provided over non-traditional facilities. The language has no bearing on the question whether an entity providing a service that is not a "telecommunications service" should be forced — through a measure like *Computer II* — to split off the transmission component of the offering and provide that component as a separately regulated "telecommunications service."

II. THE COURT OF APPEALS ERRED CONCERNING THE INTERPLAY BETWEEN *CHEVRON* AND *STARE DECISIS*.

As explained in our petition, this case affords the Court "an opportunity to resolve a conflict of authority concerning the question whether a court of appeals may decline to accord *Chevron* deference to an agency's reasonable interpretation of ambiguous statutory language where a circuit precedent antedating the agency's decision interpreted that language differently."[62] Although the Court does not have to address that question to resolve the case, it is obviously free to manifest its views on the validity of the Ninth Circuit's approach. If it decides to do so, it should state that the Ninth Circuit was wrong.

A. Except Where It Established a Statute's Clear Meaning, This Court's Precedent Does Not Trump *Chevron* Deference.

This Court first addressed the interplay between *Chevron* deference and *stare decisis* in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990). The Court there stated: "Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning."[63] The Court effectively reconciled *Chevron* and *stare decisis* by holding that agencies remain free to exercise their interpretive discretion so long as they do not run afoul of a prior precedent determining the statute's "clear meaning" — *i.e.*, reflecting a *Chevron* "Step One" determination.[64] That constitutes a sensible reconciliation: once this Court has held that a particular interpretation is impermissible, an agency obviously may not embrace it again.[65]

In *Neal v. United States*, 516 U.S. 284 (1996), however, the Court stated: "Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of stare decisis, and we assess an agency's later interpretation of the statute against that settled law." *Id.* at 295. By omitting the word "clear" from the *Maislin* formulation, the Court arguably suggested that even precedent not reflecting a "Step One" determination divests agencies of *Chevron* discretion.

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[62] Pet. 22.

[63] 497 U.S. at 131. The same language is contained in the Court's opinion in *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37 (1992).

[64] The prior precedents at issue in *Maislin* antedated *Chevron*. It has been suggested that the Court should — largely for reasons of practicality — "adopt a blanket presumption that all pre-*Chevron* precedent is step-one precedent." Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 917 (2001); *see also Alexander v. Sandoval*, 532 U.S. 275, 281 n.1 (2001) (noting "the settled principle that decisions . . . declaring the meaning of statutes prior to *Chevron* need not be reconsidered after *Chevron*").

[65] *See United States v. Mead Corp.*, 533 U.S. 218, 248 (2001) (Scalia, J., dissenting) ("in identifying the scope of the statutory ambiguity, . . . the court's judgment is final and irreversible").

Neal should not be read to extend the *Maislin* principle beyond interpretations under *Chevron* Step One — for two reasons. *First*, extending *Maislin* would scarcely make for good judicial policy: it would encourage regulated parties to race to the courthouse in the hopes of obtaining an interpretation by a court of their choosing before the agency has had an opportunity to embody its interpretation of the statute in a *Chevron*-deference-eligible format.[66] *Second*, and more fundamentally, extending *Maislin* would misapprehend *Chevron*. If, as *Chevron* counsels, a statutory silence or ambiguity signals a delegation of legislative authority no different from an express delegation,[67]

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[66] *See, e.g.*, Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. Rev. 1272, 1274 (2002) ("Determining regulatory policy by means of such a winner-takes-all race to the courtroom undermines the logic of the administrative state, a logic that delegates flexible decisionmaking power to expert administrators."); Richard W. Murphy, *A "New" Counter-Marbury: Reconciling Skidmore Deference and Agency Interpretive Freedom*, 56 Admin. L. Rev. 1, 25 (2004) ("Even to state this conclusion is to condemn it — it seems absurd to suggest that Congress intended to make allocation of primary control over construction of agency organic statutes turn on a race between agencies and courts."); Russell L. Weaver, *The Emperor Has No Clothes:* Christensen, Mead *and Dual Deference Standards*, 54 Admin. L. Rev. 173, 194 (2002) ("[R]egulated entities may obtain a significant advantage by launching a 'first strike' that deprives the agency of Chevron deference. The net result may be a significant increase in interpretive litigation."); Gregg D. Polsky, *Can Treasury Overrule the Supreme Court?*, 84 B.U. L. Rev. 185, 205 (2004) (*Neal*, read literally, leads to a "nonsensical result, which could never be desired by any rational legislator").

[67] *See Chevron*, 467 U.S. at 843-44 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.") (footnote omitted).

deferring to its exercise does not threaten judicial supremacy in "say[ing] what the law is"[68] — no more so than does obeyance to a congressional amendment overruling a judicial interpretation when Congress has retained power to itself.[69]

B. Certainly the Precedent of the Courts of Appeals Cannot Trump *Chevron* Deference.

Whatever may be true with respect to its own precedent, this Court has never suggested that *Chevron* deference can be trumped by the precedent of courts of appeals. To the contrary, on the very issue presented in this case (the proper regulatory classification of cable modem service), this Court's opinion in the *Gulf Power* case indi-

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[68] *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

[69] Merrill & Hickman, 89 Geo. L.J. at 916 ("If Congress has indeed delegated the primary power of interpretation to the agency rather than the courts, then it cannot be true that every judicial interpretation takes precedence over contrary agency interpretations. At least if the issue is one as to which the statute admits of more than one meaning, then the agency interpretation logically should take precedence over the judicial interpretation."); Weaver, 54 Admin. L. Rev. at 192 (allowing *stare decisis* to prevail over deference is "strikingly inconsistent with *Chevron*'s underlying principles"); Bamberger, 77 N.Y.U. L. Rev. at 1319 ("Denying agencies policymaking power when the judiciary rules on an issue first freezes in place decisions made by an institution with an avowedly inferior ability to assess social conditions and without the constitutional capacity to make political choices.") (footnote omitted); Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 Geo. L.J. 2225, 2258 (1997) (read literally, *Neal* "attach[es] too little significance to the values that are furthered by *Chevron* and by administrative stare decisis, and attach[es] undue significance to the values that are furthered by judicial stare decisis.").

cated that, even after *Portland*, the FCC retained *Chevron* discretion in classifying cable modem service.[70] That understanding was correct: allowing *Chevron* deference to be trumped by the precedent of courts of appeals would have ill-advised consequences well beyond allowing *Chevron* deference to be trumped by the precedent of this Court.[71]

First, allowing lower-court precedent to trump *Chevron* deference would impede uniformity among the circuits. As the Eleventh Circuit has said, it "would wed [one] circuit to [its prior precedent], while all other circuits and the Supreme Court would be bound under *Chevron* to defer to the [agency] rule."[72] In contrast, "[d]eference to the agency's view permits a nationally uniform rule without the need for the Supreme Court to essay the meaning of every debatable [statute]."[73]

Second, allowing lower-court precedent to trump *Chevron* deference would place administrative agencies in an

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[70] *See Gulf Power*, 534 U.S. at 338.

[71] *See* Pierce, I *Administrative Law* § 3.6, at 185 ("[D]ifferential treatment of Supreme Court and circuit court precedents is defensible. It reflects both a recognition of the value of obtaining consistent constructions of national statutes and the unique value of stare decisis at the Supreme Court level."); *Bankers Trust N.Y. Corp. v. United States*, 225 F.3d 1368, 1375 (Fed. Cir. 2000) (noting Government's position that "[d]ecisions of the Supreme Court are an exception").

[72] *Satellite Broad. & Communications Ass'n v. Oman*, 17 F.3d 344, 348 (11th Cir. 1994); *see also* Bamberger, 77 N.Y.U. L. Rev. at 1304 ("[s]uch disharmony fosters circuit splits across the substantive range of regulatory policy"); *Bankers Trust*, 225 F.3d at 1376 ("We recognize that [adhering to circuit precedent] has the effect of creating inconsistency with the outcomes in the parallel cases of the Seventh and Eighth Circuits, discussed above.").

[73] *Homemakers N. Shore, Inc. v. Bowen*, 832 F.2d 408, 412 (7th Cir. 1987) (Easterbrook, J.).

untenable position. Before an agency has a chance to conclude a notice-and-comment rulemaking, courts may reach conflicting decisions. Because obeying each conflicting decision is impossible, the agency must choose between flouting one or more courts' holdings and hoping for a lucky lottery draw, on the one hand, or ceasing national policy formation altogether in deference to the courts, on the other hand. If the agency chooses the latter option, it will "find itself treating similarly situated parties quite differently (and thus unfairly) depending on accidents of geography."[74] Such Balkanization is inconsistent with the very notion of agencies' nationwide regulatory jurisdiction and obligation to establish and enforce uniform national policy.

Finally, allowing lower-court precedent to trump *Chevron* deference would unnecessarily generate appeals to this Court in cases, like that here, in which the statute is ambiguous, the agency's interpretation is reasonable, and the outcome is therefore a foregone conclusion. In such cases, allowing circuit precedent to trump *Chevron* deference would inevitably lead to a result different from the result this Court, which is not bound by circuit precedent, would reach through the application of *Chevron*. Decisions of this Court should not be read to compel lower

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[74] Murphy, 56 Admin. L. Rev. at 12; *see Aguirre v. INS*, 79 F.3d 315, 317 (2d Cir. 1996) (applying *Neal* rule would be contrary to "our frequently expressed concern to avoid disparate treatment of similarly situated aliens under the immigration laws"); *Schisler v. Sullivan*, 3 F.3d 563, 568 (2d Cir. 1993) ("Any other conclusion would result in . . . chaos . . . ."); Pierce, 85 Geo. L.J. at 2243 ("When a circuit court chooses to adhere to a circuit precedent instead of deferring to an agency's reasonable interpretation of ambiguous statutory language, it risks creating a legal environment characterized by unintentional, irrational discrimination.").

courts to commit error. The Ninth Circuit's reading of *Neal* must therefore be wrong.

CONCLUSION

The judgment of the court of appeals should be reversed.

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